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ANTON PILLER ORDERS IN NIGERIA

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INTRODUCTION

In this article I shall examine the principles that guide Nigerian courts in granting Anton Piller orders in the wake of the Court of Appeal decision in *Akuma Industries Ltd v Ayman Enterprises Limited*.¹ This decision is significant because it is one given so far by an appellate court in Nigeria on the issue.

An Anton Piller order has been described as:

... an injunctive remedy which is obtainable *ex parte* to facilitate the inspection of the premises of a suspected copyright infringer and the seizure of infringing copies or such relevant materials and documents which are vital to the prosecution of the plaintiff's case, but which could be destroyed by the defendant, if he had prior notice of litigation against him.²

It is to be noted that the definition above is correct except that it is used in other intellectual property cases.³ Four years after the Anton Piller order was conceptualized in the case of *Anton Piller KG V Manufacturing Process Ltd*,⁴ Nigerian courts in the case of *Ferodo Ltd V Unibras Stores*⁵ and *Ferodo Ltd v West Germany & Trading Co Ltd*⁶ applied the remedy. The order has received statutory recognition with respect to copyright issues by virtue of the Copyright Act.⁷ Section 22 of the Copyright Act provides that:

In any action for infringement of any right under this Act, where an *ex parte* application is made to the court, supported by an affidavit and there is reasonable cause for suspecting that there is in any house or premises any infringing copy or any plate, film or contrivance used or intended to be used for making infringing copies or capable of being used for the purpose of making copies or any other article, book or document by means of or in relation to which any infringement under this Act has been committed, the Court may issue an order upon such terms as it deems just, authorizing the applicant to enter the house or premises at any reasonable time of the day accompanied by a police officer not below the rank of an Assistant Superintendent of Police and (a) seize, detain, and preserve any such infringing copy or contrivance; (b) inspect all or any documents in the custody of the defendant relating to the action.

1. [1999] 13 NWLR (pt. 633) p. 68. Hereinafter referred to as *Akuma Industries*.
2. Ayo Oriola 'Anton Piller Order As A Remedy for Copyright Infringements: A Martial Law in Disguise' (1999) Vol. 3 No. 3 *Modern Practice Journal Of Finance And Investment Law*, pp. 507-508. See *Universal Thermosensors V Hibben* [1992] F.S.R 361.
3. For example *Universal Thermosensors V Hibben ibid* (breach of confidential information); *Ferodo Ltd V Unibras Stores*, Suit No. FHC/L/21/80; (1980) F.S.R 489. *(registered trademarks).
4. 1976 Ch 55.
5. Note 3.
6. 1980 FHCLR 116.
7. Cap 86, Laws of the Federal Republic of Nigeria 1990.

The application of the order has been fraught with controversy in its statutory and common law form. The controversy is with respect to the constitutional validity of the order and secondly the scope and application of the order.

Nigerian courts have questioned the constitutional validity of the order.⁸ So have learned commentators.⁹ Their contention is that the Anton Piller order contravenes constitutionally guaranteed human rights such as the right to privacy. Section 37 of the 1999 Constitution, which provides for the right to privacy is of the tenor that: "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected." The order is also said to be in breach of the right to fair hearing provided for by section 36(1) of the 1999 Constitution. The said section provides that "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality."

The controversy on the scope and application of the order in Nigeria is well described by Balogun thus:

The scope and application of Anton Piller orders in Nigeria today is now so wide, that the plaintiffs are using these orders to close down defendants business. The service and execution of Anton Piller orders have become conclusive of litigation with few defendants having the enthusiasm to continue the fight. Instead of being a mere search and seize order, the Anton Piller in Nigeria has become a search, seizure and seal up order.¹⁰

To examine the different heads of controversy outlined above, we shall now turn to the decision of the Court of Appeal in *Akuma Industries* as the medium of analysis. As stated above, this judgement is important as it is so far the highest decision of Nigerian courts on the Anton Piller order and does indicate the position of the law.

THE COURT OF APPEAL DECISION IN *AKUMA INDUSTRIES V AYMAN ENTERPRISES*

In *Akuma Industries*, the respondent/plaintiff sued the defendants/appellants seeking for a perpetual injunction restraining the latter from passing off their products, manufacturing, importing, selling or offering for sale their product and infringing their copyright in the product; delivery up for destruction all the products in question; an affidavit of disclosure; and damages for passing off their fake and counterfeit product as that of the plaintiff/respondent. At the same time of filing the action, the respondent also filed a motion *ex parte* praying for several Anton Piller orders in terms similar to the claim on the writ of summons. The trial court granted the order and the respondent executed the order. Then defendants filed an application before the trial court to set aside the orders made and that

8. See the following cases *Solignum Ltd V Rogers Adetola* (1992) FHCLR 157; *Rokana Industries PLC V Maun*, (1993) FHCLR 243; *Sony Kabushiki Kaisha V Hahani & Co Ltd*, Unreported suit No. FHC/L/35/81.

9. See Stephen Kola-Balogun, 'Scope Application and Validity of Anton Piller Orders in Nigeria', Vol. 4 1997 *Modus International Law and Business Quarterly* 96.

10. *Ibid*, p. 100.

the plaintiffs should return all the products and materials of the defendants seized when the Anton Piller order was executed. Their ground upon which relief was sought was that the plaintiff/respondent suppressed or concealed or did not state material facts, which would not have entitled to the order. The relevant facts concealed were that the respondents apologized for the use of the trade name of the products in question when he was confronted by the appellants on learning that the respondents had put a product by that name into the market. From the totality of evidence it is evident that both parties had applied to the Registrar of Trademarks to register their trade names. Their applications to register their trade names were both accepted by the Registrar but neither of them had obtained a certification of registration. It is also a fact that the application of the plaintiff was first in time. The learned trial judge refused to set aside the order. Whereupon, the defendants appealed to the Court of Appeal, alleging concealment of relevant facts. It is to that decision as they relate to the different heads of controversy that we now turn.

The Validity of the Anton Piller Order

In *Akuma Industries* the Court of Appeal held that the Anton Piller order is valid in Nigeria. In the opinion of Pats-Acholonu JCA who read the lead judgement of the Court:

... the Anton Piller injunction by its very nature is *ex facie* subversive of the provision of section 33 of the former constitution but it is allowed by the Court in extreme cases having regard to the urgency of the situation.¹¹

In consequence therefore all the doubts about the validity of the order have been put to rest. For example, Oriola argued that:

... the constitutionality of this order is in doubt. Apparently it violates the right to privacy of peoples' homes and properties. Though section 41(b) justifies such a violation by a law that is reasonably justifiable in a democratic society for protecting the rights and freedom of other person, it is still debatable whether an order obtained *ex parte* to facilitate surprised search, seizure of properties and to extract information which could be used in subsequent criminal proceedings is reasonably justifiable in a democratic society.¹²

In *Solignum Ltd V Rogers Adetola*,¹³ Sanyaolu J said:

The question which now arises is whether or not the decisions in Anton Piller and Ferodo cases will still apply today in our courts in the light of the provision contained in our constitution ... in Nigeria today, the right of fair hearing is a right which is entrenched in the Constitution and the legal effect of an entrenched provision of the constitution is that it overrides all contrary provisions in any law of the land be they substantive or be they adjectival.¹⁴

It is regrettable that the Court of Appeal is not very convincing in the summary manner in which the basis of the validity is declared. The constitutionality of the order was not firmly addressed. Perhaps it is possible to find further elaboration of the point being made by the

11. Note 1, p. 88.

12. Note 7, p. 516

13. Note 6.

14. Note 6, p. 163.

Court of Appeal in the following cases which examine the constitutionality of *ex parte* orders for interim and interlocutory injunctions: *Kotoye v C.B.N.*¹⁵ *7-Up Bottling Co Ltd v Abiola & Sons (Nig) Ltd*;¹⁶ *Provisional Liquidator Tapp Industries V Tapp Industries*¹⁷ and *Woluchem V Wokoma*.¹⁸ *Adio JSC in 7-Up Bottling Co Ltd v Abiola & Sons (Nig) Ltd* clarifies the distinction in this way:

An interlocutory injunction cannot generally be granted without giving prior notice of the application to a respondent and the order cannot be made behind the respondent in view of the fact that the court has to decide many things before it can properly come to a conclusion on the question whether to grant or to refuse it. Further, and this is very important, a grant of an application for an interlocutory injunction without notice to the respondent or behind the respondent is void by virtue of the provisions of section 33(1) of the Constitution. An order of interim injunction is one granted to preserve the *status quo* and to last until a named date or definite date or until further order or pending the hearing and determination of a motion on notice. It is for a situation of real emergency to preserve and protect the rights of the parties from destruction by either of the parties. It merely leaves matters in *status quo* and the court does not at this stage have to decide any contentious issues before granting it . . .¹⁹

Uwais J.S.C (as he then was) was also of a similar opinion:

In both criminal and civil proceedings there are certain steps to be taken which are incidental or preliminary to the substantive case. Such steps include motions for directions, interim or interlocutory injunction. The time available for taking the steps may be too short or an emergency situation may have arisen. It therefore becomes necessary to take quick action in order to seek remedy for or arrest the situation. It is in respect of such cases that provisions are made in court rules to enable the party to be affected or likely to be affected to make *ex parte* applications. The orders to be made by the court, unlike final decisions, are temporary in nature, so that they do not determine the "civil rights and obligations" of the parties in the proceedings as envisaged by the constitution.²⁰

It seems that this distinction effectively explains the basis of the Anton Piller order as being given in urgent, emergency situations to preserve the *status quo* of the parties as they go into hearing.

With respect to the contention that the Anton Piller order breaches the right to privacy, an answer can be found in section 45 of the 1999 Constitution of the Federal Republic of Nigeria which is a derogatory clause and sanctions the breach by any law, of many fundamental human rights including the right to privacy if the law is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedoms of other persons. This argument has found favour in other jurisdictions. In the case of *Chappell V United Kingdom*,²¹ the European Court of Human Rights evaluated article 8 of the European Convention on Human

15. (1989) 1 NWLR (pt. 98) 419.

16. [1995] 3 NWLR (pt. 383) 257.

17. [1995] 5 NWLR (pt. 393) 9.

18. (1974) 3 S.C 153.

19. Note 16, p. 278.

20. *Ibid*, p. 282.

21. [1989] F.S.R 617.

Rights, which is similar to section 45 of the 1999 Constitution. In that case, an Anton Piller order was obtained and executed against Mr Chappell who operated a video exchange club. Mr Chappell claimed that the order had been improperly obtained, served and executed. The High Court refused his claims and leave was refused to enable him appeal to the House of Lords. He then approached European Commission on Human Rights and contended that the order was in breach of article 8. The Commission found no violation of article 8. The European Court of Human Rights in turn upheld this finding. The Court concluded that an Anton Piller order is not in breach thereof because it contained adequate safeguards against arbitrary interference and abuse.

Conditions For the Grant of an Anton Piller Order

Ormrod L.J in *Anton Piller V Manufacturing Processes*²² laid down three conditions for the grant of the Anton Piller order, which Nigerian courts may be said to have adopted. They are: (i). there must be an extremely strong *prima facie* case; (ii). the damage, potential or actual must be very serious for the applicant; and (iii). there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a strong possibility that they may destroy such material before any application *inter partes* can be made. A fourth condition seems to be laid down in *Akuma Industries*, which is that the party applying for the order must make a full and complete disclosure of the facts.²³

A consideration of section 22(1) of the Copyright Act above shows that the grounds for the grant of the statutory Anton Piller is that principally there is reasonable cause for suspecting that devices used in copyright infringement exist in the premises sought to be searched. We shall now turn to a consideration of the cases to show how the courts have applied these conditions.

In *Ferodo Limited V West Germany and Nigeria Trading Co Ltd*.²⁴ The Federal High Court granted the Anton Piller order as sought on the ground that a strong *prima facie* case had been made out by the plaintiffs. The plaintiff were the suppliers of motor spare parts with the trademark 'Ferodo' to Cornels Nig Ltd who were the sole distributors in Nigeria and which they had sold on a large scale for fifty years. Acting on a tip-off the sole distributors visited the defendants premises and purchased 10 cartons of goods that were similar to plaintiffs merchandise with the trade mark 'Ferodo' on the cartons and on the products. Their application was supported by three affidavits sworn to by the Sales Manager of the sole distributors; the patents agent of the group of companies of which plaintiffs are a constituent part and a director of the plaintiffs. In addition the infringing goods and the purchase receipt were also produced in evidence, as were the relevant registered trademarks in Nigeria. In granting the application, Tofowomo J said:

In an application of an interim injunction such as the present one, it is not necessary for the plaintiff to make out a case on the merits as he would have had to do to obtain

22. Note 3.

23. See also the cases of *Jeffrey Rogers Knitwear Productions Ltd v Vinola Knitwear Manufacturing Company* [1985] F.S.R 184.

24. (1980) F.H.C.L.R 116.

a perpetual injunction and it is sufficient if he establishes that a matter to be tried exists and the court may issue an interim order to maintain the *status quo* until the determination of the case.²⁵

If the learned trial judge in *Akuma Industries* had demanded for the certificate of registration of trademark of the goods, it would have been clear to him on its non-production that the issues between the parties demand that the other party be put on notice. It was also regrettable that when the defendants/appellants sought to discharge the order, their affidavit should have disclosed that apart from non-disclosure of a material fact, no strong *prima facie* case had been made out by the plaintiff/respondent. Given the seriousness of the order, it is important that the courts demand for clear evidence of the existence of a right and the breach of that right. Any doubts should lead to the other party being put on notice.

There is not much evidence that other than the requirement of a strong *prima facie* case the conditions laid down in *Anton Piller KG V Manufacturing Process Ltd* play a significant role in the decision of the courts.

One of the grounds for the grant of the order is that the plaintiffs enter into an undertaking as to damages to indemnify the defendant in the event that the order should not have been granted in the first place.²⁶

It is pertinent to note the provisions of Order 9 Rule 12(1) of the Federal High Court²⁷ Civil Procedure Rules 2000, which provides that:

No order made *ex parte* shall last for more than 14 days after the affected party has applied for the order to be varied or discharged or last for another 14 days after the application to vary or discharge it had been concluded.

Rule 12(2) further provides that:

if a motion to vary or discharge the *ex parte* order is not taken within 14 days of its being filed, the *ex parte* order shall automatically lapse.

The aforementioned rules apply to Anton Piller orders since they are obtained *ex parte*. The rules are a welcome addition and will serve to check some of the abuses of the indiscriminate grant of the order.

The Nature of the Order

Nigerian courts seem to have forgotten the basis of Anton Piller orders and often grant orders that have nothing to do with obtaining evidence. For example in *Akuma Industries*, the learned trial judge granted the following order:

It is hereby ordered as follows:

- (2) That the defendants/respondents and each of those upon whose behalf the defendants/respondents are sued whether acting by themselves, their servants,

25. *Ibid* at p. 120.

26. *Columbia Picture Industries V Robinson*, *ibid*.

27. The Federal High Court is endowed with exclusive jurisdiction by section 251(f) of the 1999 Constitution to deal with intellectual property cases.

agents, privies or otherwise however are hereby restrained from doing or authorizing the doing of the following acts or any of them; that is to say:

- III. manufacturing, importing, selling, offering for sale, supplying or inviting offers to acquire or distribute for the purpose of sale, products purporting to be wigs and hair attachments bearing the trademark "Original Queens" or any other words so closely resembling the plaintiff/applicant's trademark and device "New Queen" applied for and accepted for registration in class 26 . . .
- IV. Passing-off or attempting to pass-off or causing, enabling or assisting others to pass-off products purporting to be wigs and hair attachments not of plaintiffs/applicants manufacture or merchandise as and for the goods of the plaintiffs/applicants by the use or in connection therewith in the course of trade of the trademark "Original Queens" or adopting the Get-up, Logo, Label identical in all essential details to that of the plaintiffs/applicant's "New Queens" or any colorable imitation thereof without duly distinguishing such Trademark, Get-up, Logo, or Label from that of plaintiff/applicant or by any other means.
- V. Infringing the copyright in the Artistic work of the plaintiff/Applicant's Trademark "New Queen", its Get-up, Logo, Package and Distinctive Label.²⁸

The devastating effect of this order can be seen from the history of this case. The judgement of the Federal High Court refusing the application to discharge the order was delivered on the 28th of November 1996 and the appeal succeeded on the 18th of July 1999 — *almost three years after*.²⁹ The order reproduced above could not have been intended to preserve any *status quo* or to obtain any evidence. It was simply granting plaintiffs the final orders sought without giving the other side the opportunity to challenge the plaintiff's assertions. Before the Court of Appeal discharged the order almost three years later, the business of the defendant/respondent lay prostrate. Imagine all those defendants that have no means of challenging an Anton Piller order and the hardship that has been caused thereby. Scott J in *Columbia Picture Industries V Robinson*³⁰ clearly stated that the order should not be drawn beyond the purpose of preserving documents and articles, which might otherwise be destroyed or concealed. If this were adhered to, the orders like the ones given in *Akuma Industries* would not have been made.

Furthermore, the plaintiff should take enough copies of the infringing articles or contrivances needed for the prosecution of the case and return same to the defendant. If the items should be kept for the prosecution of the case, they should be in the custody of the court.

The Execution of an Anton Piller Order

The provisions of section 22 of the Copyright Act have influenced Nigerian courts in the prescription of the conditions for the execution of the Anton Piller order even in non-copyright cases. Section 22 of the Copyright Act *inter alia* "permits the applicant to enter the house or premises at any reasonable time accompanied by a police officer not below

28. Note 1, pp. 79-80. See similar orders in the following cases: *Dickens Enterprises Ltd v Zukky International (Nig) Ltd*, suit no. FHC/L/CS/318/2000, *The Guardian* (Nigeria), Wednesday, October 4, 2000, p. 69.

29. Emphasis mine.

30. [1986] F.S.R 367.

the rank of an Assistant Superintendent of Police and (a) seize, detain and preserve any such infringing contrivance; (b) inspect all or any documents in the custody or under the control of the defendant relating to the action.” Nigerian courts, now commonly prescribe the requirement that the order be executed in the presence of police officers.³¹ In addition all orders are to be executed in the presence of court bailiffs. The presence of the police officers is to ensure that the orders of the court are carried out to the letter. Whether their presence achieves this or not is a matter which needs to undergo further detailed investigation. However, given the militarised nature of the Nigerian society, it should not be surprising that police officers are added to underscore the seriousness of the order, ensure faster compliance and authenticate the validity of the order. The use of neutral solicitors in the execution of the order as is the case in England is attractive. However, it must be appreciated that the nature of the practice of law in Nigeria — where legal practitioners practise as solicitors and advocates — may make the use of legal practitioners more cumbersome. More serious is the observation that very few practitioners are conversant with intellectual property matters and therefore not able to be of serious assistance to the court. Whoever is used, it seems that the manner of execution is of importance. For example, Nigerian courts do not require that a detailed inventory of the items taken from the premises of the defendant be kept and filed in the court on the return date where service is to be reported to enable the court ascertain compliance with its order. The order obtained by the plaintiff/applicant in *Eastman Kodak Company V Kodak Company*³² in paragraph 4 only required that the plaintiff’s solicitor take the inventory. There was no requirement that it be filed in court. In *Akuma Industries*, the order stated that the goods and other articles found in the premises of the defendant were to be kept in the custody of the plaintiff/applicant.³³

CONCLUSION

Having crossed the hurdle of validity, it seems that more needs to be done with respect to the conditions for the grant, the nature of, and the execution of Anton Piller orders in Nigeria. Since the Court of Appeal in *Akuma Industries* missed the opportunity to clarify these issues, it is necessary that at the earliest opportunity, an appellate court should do so. In the alternative, a practice direction by the Chief Justice of Nigeria in line with our discussions above will be in order.

31. See *Nigerian Distilleries Limited V Mega sea Distilleries* Suit No. FHC/L/CS/142/98. Order reproduced in *The Guardian* (Nigeria) Saturday, March 27 1999, p. 18 and *Eastman Kodak Company V Kodak Paints Limited*, suit No. FHC/L/CS/397/99. The order is reproduced in *The Guardian* (Nigeria) Friday May 7, 1999 p. 31. The former required only that four police officers attend the execution while the latter required only that a police officer not below the rank of sergeant be present. The Copyright Act requires a police officer not below the rank of Assistant Superintendent of Police to be present.

32. *Ibid.*

33. Note 1, p. 81.



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